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No. 83-1489

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT JOHNSON and GERALDINE JOHNSON,
Petitioners,

vs.

CITY OF GLENCOE, GAVIN LAW OFFICE, MICHAEL GAVIN, KERRY OLSON, GARY BALLARD, COUNTY OF McLEOD, GLENCOE-McLEOD JOINT AIRPORT ZONING BOARD, EDWIN HOMAN, RUSSELL BACON and ELFEGE AUSTAD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a claim for monetary damages under 42 U.S.C. § 1983 barred under the res judicata doctrine if it could have been raised in prior state court litigation?

2. Did the United States Court of Appeals for the Eighth Circuit correctly interpret Minnesota law in holding, based on recent Minnesota Supreme Court case law, that petitioners could have raised their monetary damage claims in their prior state court action?

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Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion in this case of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

As petitioners' Statement of the Case is largely argumentative, respondents adopt as their statement of the case

the Eighth Circuit's factual discussion in its opinion, *Johnson v. City of Glencoe*, 722 F.2d 432, 433 (8th Cir. 1983) (per curiam). Petition, at App. 1-3.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

PETITIONERS' PRIOR STATE COURT ACTION BARS THEIR SUBSEQUENT FEDERAL COURT ACTION AS A MATTER OF RES JUDICATA.

An action brought under 42 U.S.C. § 1983 is barred under the doctrine of res judicata if the § 1983 claim could have been raised and litigated in a prior state court adjudication, but was not. *Migra v. Warren City School District Board of Education*, 104 S. Ct. 892 (1984). Petitioners' attempt to circumvent the holding of *Migra* by arguing that their claim for temporary taking damages could not have been litigated in their state court action is fundamentally flawed. The Eighth Circuit correctly concluded that the state court forum afforded petitioners a full and fair opportunity to advance their claim for temporary taking damages. That decision does not warrant further review by this Court.

II.

PETITIONERS WERE NOT PRECLUDED FROM OBTAINING RELIEF ON THEIR CLAIM FOR TEMPORARY TAKING DAMAGES IN THEIR PRIOR STATE COURT ACTION.

The United States Court of Appeals for the Eighth Circuit recognized that Minnesota law permits a plaintiff to recover damages in a state court action similar to that

brought by petitioners. As stated by the Eighth Circuit in its opinion: "Our reading of the *McShane* case does not convince us that the Johnsons were precluded from seeking an award of damages." *Johnson v. City of Glencoe*, 722 F.2d 432, 433 (8th Cir. 1983). The circuit court's interpretation of Minnesota law is entitled to deference because the circuit court is peculiarly suited by experience to apply the local law of the seven states within its borders. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

Petitioners argue that the court of appeals misconstrued Minnesota law. They suggest that in *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), the Minnesota Supreme Court restricted the relief available in a taking case brought under the fifth amendment of the United States Constitution to injunctive relief. According to petitioners, the *McShane* decision thus conflicts with the view stated in the dissent of *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), that the government must provide just compensation to a property owner for even temporary takings.

A careful reading of *McShane* establishes that the court of appeals correctly applied Minnesota law. In *McShane*, as here, property owners brought an action challenging an airport zoning ordinance as a taking without just compensation. 292 N.W.2d at 255. The trial court ruled in favor of the property owners, finding that there would be a substantial diminution in the value of their property, which would result in a taking without compensation in contravention of U.S. Const. amend. V and Minn. Const. art. 1, § 13. 292 N.W.2d at 255. The trial court held mandamus to compel the city to initiate eminent domain proceedings was the appropriate remedy and awarded attorneys' fees

and experts' fees to plaintiffs under Minn. Stat. § 117.045 (1978). 292 N.W.2d at 255.

The Minnesota Supreme Court agreed in substance with the trial court's holding that enforcement of the airport zoning regulations would constitute a taking of the property owner's property without just compensation, but reversed the judgment issuing mandamus and remanded with instructions. *Id.* After analyzing the function and impact of the airport zoning ordinance, the court held that:

> [W]here land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations.

Id. at 258-59. The court also held, however, that mandamus to compel eminent domain was not the appropriate remedy since a government's decision to purchase property is discretionary. *Id.* at 259. Rather, the proper relief would be an injunction against enforcement of the ordinance, thereby allowing the governmental entity to decide whether to spend potentially huge amounts of money on the necessary property rights or to close the airport. *Id.*

Contrary to petitioners' assertion, the Minnesota Supreme Court did not hold in *McShane* that compensation for temporary taking damages would not be allowed. In fact, the only language in the opinion even arguably related to this issue strongly suggests that the opposite is true. The court stated that "[o]nly where the taking or damage is irreversible would an injunction against enforcement not provide an adequate remedy." *Id.* Similarly, in footnote 6, the court stated that it "would limit the use of inverse condemnation

to cases where an injunction would not restore plaintiffs to their original status." *Id.* at 260 n.6. The supreme court did not distinguish between irreversible *permanent* damages or irreversible *temporary* damages. Thus, recovery of temporary taking damages, which are by definition irreversible damages, was not foreclosed by either the holding, the rationale, or the dicta of the *McShane* decision.[4]

Petitioners' state court action presented essentially the same claim and issues addressed in *McShane*. While petitioners introduced evidence in the state court as to the substantial diminution of value which would result from *permanent* enforcement of the airport zoning ordinance, they did not advance any evidence of temporary physical or economic damages, though they were not barred from doing so. Petitioners' argument that the *McShane* decision foreclosed their recovery of temporary taking damage does not comport with its language. The Eighth Circuit correctly read *McShane;* it is petitioners who have misunderstood the implications of that decision.

CONCLUSION

This petition does not present any substantial question of federal law. The Eighth Circuit concluded that, as a matter of Minnesota law, petitioners could have brought their damages claim in their prior state court action. Thus, petitioners had a full and fair opportunity to advance all of their claims in the prior state court adjudication, including their claim for temporary taking damages. Their subse-

[4]This conclusion is supported by the progeny of *McShane*. *City of Mankato v. Hilgers*, 313 N.W.2d 610, 613 (Minn. 1981); *Pratt v. State, Dep't of Natural Resources*, 309 N.W.2d 767, 773-74 (Minn. 1981); *Crookston Cattle Co. v. Minnesota Dep't of Natural Resources*, 300 N.W.2d 769, 774-75 (Minn. 1980).

quent federal court action arises out of a common nucleus of operative fact and, therefore, is barred as a matter of res judicata. Petitioners have failed to establish any cognizable reason for review by this Court of the decision by the United States Court of Appeals for the Eighth Circuit. Accordingly, respondents respectfully request that the Petition for a Writ of Certiorari to the Eighth Circuit be denied.

Respectfully submitted,

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